FILED COPY
AUG 12 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

No. 69-5001

LYMAN A. MOORE,

Petitioner,

v.

ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

BRIEF FOR PETITIONER

GERALD W. GETTY, Public Defender
of Cook County, Illinois,
RICHARD J. HORKA and
WILLIAM H. HALL, and
JAMES J. DOHERTY, Assistant Public
Defender

By: JAMES J. DOHERTY
Room 1124
County Building
Chicago, Illinois 60602

Counsel for Petitioner

Washington, D. C. THIEL PRESS 202 393 0625

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1, 2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	8
ARGUMENT	
I. Failure of the State to Disclose Six Items of Exonating Evidence to Petitioner at Trial Denied Him a Fair Trial and Due Process of Law	11
II. Where the Deceased Was Killed With a Twelve-gauge Shotgun, the Introduction and Use of a Sixteen-gauge Shotgun Totally Unconnected With the Accused or the Crime Charged Denies the Accused a Fair Trial and Due Process of Law	23
III. Death Penalties Cannot be Constitutionally Executed Where Veniremen are Removed for Cause Simply Because They Voiced General Objections to Capital Punishment or Had Religious or Conscientious Scruples Against Its Infliction	28
CONCLUSION	32
APPENDIX	
Opinion of the Supreme Court of Illinois	App. 1a

LIST OF AUTHORITIES CITED

Cases:

Alcorta v. Texas, 355 U.S. 28	20
Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842	12, 19
Boulden v. Holman, 394 U.S. 478	29
Brady v. Maryland, 373 U.S. 83	11, 13
Giles v. Maryland, 386 U.S. 66	12, 20
In re Anderson, 73 Cal. Rptr. 21	10, 19, 32

Page

Jackson v. Wainwright, 390 F.2d 288 13

Miller v. Pate, 386 U.S. 1 20

Mooney v. Holohan, 294 U.S. 103 . . . . . 12, 20

Napue v. Illinois, 360 U.S. 264 20

People v. Speck, 41 Ill. 177 . . . . . 10, 28

Pyle v. Kansas, 317 U.S. 213 12

Speck v. Illinois, _____ U.S. _____, June 28, 1971 . . . 10, 28, 29, 32

Spencer v. Texas, 385 U.S. 554 . . . . . 24, 27

United States v. Baldi, 195 F.2d 815 12

United States v. Dye, 221 F.2d 763 12

United States v. Wilkins, 326 F.2d 135 . . . . . 12, 13

Witherspoon v. Illinois, 391 U.S. 510 . . . . . 3, 6, 28

Constitutional Provisions Involved:

Sixth and Fourteenth Amendments to the United States Constitution 3

IN THE

Supreme Court of the United States

No. 69-5001

LYMAN A. MOORE,

Petitioner,

v.

ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

BRIEF FOR PETITIONER

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Illinois (App. 1a-19a) are reported at 42 Ill. 2d 73, 246 N.E. 2d 299.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on January 29, 1969. A timely petition for rehearing filed on February 19, 1969, was denied on March 25, 1969. The petition for a writ of certiorari was filed on June 23, 1969, supplemented on July 20, 1970,

and granted on June 28, 1971, limited to questions 1, 3 and 4.

Jurisdiction of this Court is conferred by Title 28, U.S.C., Sec. 1257(3).

QUESTIONS PRESENTED FOR REVIEW.

1. Petitioner was sentenced to death for murder. Six items of exonerating evidence were not disclosed to him at trial. The court below affirmed on the ground that the prosecution's duty to disclose exonerating evidence depends upon a request; that the prosecutor had shown his entire file to defense counsel at trial and no further request for disclosure was made. None of the exonerating items was contained in said file. Trial defense counsel were ignorant of the existence of the suppressed information.

Questions presented are:

(a) Whether a request is an indispensable prerequisite to disclosure of exonerating evidence by the State?

(b) Whether material evidence favorable to an accused should be disclosed by the State without a request where such evidence is not recorded?

(c) Whether denial of due process of law is contingent upon a request where a State knowingly permits false testimony to remain uncorrected?

(d) Where a prosecutor shows his entire file to defense counsel at trial, but none of the exonerating items of evidence are contained in said file, does that satisfy the prosecution's duty of disclosure?

(e) Whether nondisclosure of the prosecuting police department is imputable to the prosecution?

2. The deceased was killed with a twelve-gauge shotgun. The Chicago Scientific Crime Detection Laboratory determined that he was killed with a twelve-gauge shotgun. (A. 139) The prosecutor stated in a Bill of Particulars that the murder weapon was a twelve-gauge shotgun. (A. 2)

Over objection (A. 81-94), the prosecution introduced a sixteen-gauge shotgun into evidence. (A. 94) The sixteen-gauge shotgun did not belong to the petitioner, was not recovered from him, and was never in his possession or control. (A. 58, 66-71)

During closing argument the prosecutor told the jury that the sixteen-gauge shotgun was not the weapon that killed the deceased, but that any man who was with another man who had the shotgun and shells for it was the type of person that deserved the death penalty. (A. 191-201, 204-206)

The question presented is whether the introduction and use of such evidence, totally unconnected with the petitioner or the crime charged, denied the petitioner a fair trial?

3. Eight veniremen were removed for cause when they voiced general objections to capital punishment or stated that they had religious or conscientious scruples against the death penalty in a proper case.

In the light of *Witherspoon v. Illinois*, 391 U.S. 510, may a state court of review affirm a death sentence,

(a) on the ground that the tenor of *voir dire* examination was unlike that of *Witherspoon*?

(b) on the ground that the prosecution had sufficient peremptory challenges to have eliminated those prospective jurors eligible to serve under *Witherspoon*?

CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . have the assistance of counsel for his defense."

Fourteenth Amendment:

> ". . . nor shall any State deprive any person of life . . . without due process of law; . . ."

STATEMENT OF THE CASE

At 10:00 P.M. on April 25, 1962, a bartender in Lansing ejected a profane customer from his tavern. (A. 25-26, 118-119) At 10:55 P.M. that customer returned and shot him in the heart with a twelve-gauge shotgun. (A. 2, 26, 139) Two days later, a man known only as "Slick" bragged that he had shot the bartender in Lansing. (A. 351)

At the trial twenty-five months later, Patricia Hill, a waitress, identified your petitioner as the ejected customer who returned to the tavern and shot the bartender. (A. 25-26) On cross examination defense counsel sought to elicit the circumstances under which she first identified the petitioner, but prosecution objections were sustained on the ground that the questions went "beyond the examination in chief." (A. 28, 31) Henley Powell identified the petitioner as the man who came into the tavern and shot the bartender. Powell had not been in the tavern when the customer was ejected. (A. 32) Similarly, objections to the efforts of the defense to ascertain the circumstances of the initial identification of the petitioner by Henley Powell were sustained. (A. 38)

A prosecution witness named Virgle Sanders identified the petitioner as the man known only as "Slick" who had bragged two days after the murder that he had shot a bartender in Lansing. (A. 44, 47) A written statement that Virgle Sanders had given to the Lansing Police (A. 351) was *not* turned over to defense counsel for use on cross examination. (A. 41-50, 326-327, App. 14a-15a, 17a)

Over objection, a sixteen-gauge shotgun was admitted in evidence (A. 81-94) and used against petitioner. (A. 191-201, 204-206) It was totally unconnected with the petitioner or the crime charged. (A. 58, 66-71)

The defense presented the testimony of one Donald O'Brien who testified that petitioner was *not* the man ejected from Zitek's tavern. (A. 114-116) The head bartender and the general manager of Westmoreland Country Club in Wil-

mette, both testified, and the employment records of the Club showed, the petitioner was employed as a cocktail waiter until after midnight on the night of the murder. (A. 96-97, 99-103, 106-113) Petitioner was paid overtime for that work. (A. 99, 106, App. 13a)

Petitioner was found guilty (A. 218) and was sentenced to death. (A. 220)

At a post-conviction hearing in January, 1967, it was shown that the Lansing Police and/or the prosecution had concealed six items of exonerating evidence from petitioner at trial:

1. Virgle Sanders' written statement to the Lansing Police which showed that he first met the man known as "Slick" on or about November 1, 1961, in Wanda and Del's tavern. (A. 351)

   (Lyman Moore was in a federal penitentiary from February 18, 1957 until March 4, 1962. (A. 354) When confronted at the post-conviction hearing with the fact that petitioner had been incarcerated in a federal penitentiary until March 4, 1962, Sanders admitted that it was *impossible* that petitioner was the man known only as "Slick" who had bragged that he had shot the bartender. (A. 296))

2. The same night that the Lansing Police obtained Virgle Sanders' written statement they raided Wanda and Del's tavern looking for "Slick". Delbert Jones, the owner of Wanda and Del's told them that he knew and could identify "Slick". (A. 254)

   (Six months later when petitioner Lyman Moore was arrested (A. 58), the Lansing Police did *not* contact Delbert Jones for the purpose of having him view petitioner and identify him as the man known only as "Slick". (A. 255))

3. Right after Virgle Sanders supplied the name "Slick", the Lansing Police had an immediate suspect, James E. "Slick" Watts. A photograph of "Slick" Watts was contained in their file. (A. 275) Chief Braschler assigned Lt. Turbin to look for "Slick" Watts. (A. 346)

4. After petitioner Lyman Moore was arrested on October 31, 1962 (A. 58), the Lansing Police photographed him and took said photograph (A. 272, 361) to the home of William Leon Thompson. (A. 251) William Leon Thompson used to patronize Wanda and Del's tavern in the autumn of 1961. He knew the owner of Wanda and Del's, Delbert Jones, and Virgle Sanders, and also knew and could identify the man known only as "Slick". He told Lt. Turbin and Sergeant Vandernoord of the Lansing Police that Lyman Moore did not resemble "Slick". (A. 255, 267, 273, 278)

5. When Virgle Sanders first saw petitioner Lyman Moore at trial some twenty five months after the man known only as "Slick" had bragged that he had shot Bernie Zitek, he said to the Lansing Police officers in the presence of the prosecutors, "The guy that I knew as 'Slick' looked to be about 30 or 40 pounds heavier than this guy." (A. 294) The Lansing Police officers said, "Well, you know how those jailhouse beans are." (A. 295)

6. The Lansing Police file contained a diagram, drawn by a Lansing officer, that would have contradicted the prosecution witness Henley Powell and corroborated the defense witness Donald O'Brien; it showed Henley Powell seated with his back to the entrance through which the assailant entered. (A. 244-245, 260-261, 340-341, 357-358, 360)

On appeal, the majority of the court below affirmed petitioner's conviction and death sentence, but did not mention the unrebutted alibi evidence of two witnesses corroborated by work records; the majority held that the prosecution's duty to disclose exonerating evidence depends upon a request; that the prosecutor had shown his entire file to defense counsel during trial and no further request for disclosure was made (App.7a); that cross examination had not been restricted; that the sixteen-gauge shotgun had been properly admitted in evidence. (App. 4a) *Sua sponte*, it held that *Witherspoon v. Illinois*, 391 U.S. 510, is not controlling at bar. (App. 8a-11a)

On petition for rehearing, petitioner pointed out from the Record that the exonerating evidence was not contained in the prosecutor's file; that trial defense counsel were ignorant of the existence of the suppressed exonerating evidence, and could not reasonably be expected to request something that they did not know existed. (Pet. Reh. pp. 2-18); that the court had ignored his unrebutted alibi evidence (Pet. Reh. p. 18); and that cross examination had been restricted. (Pet. Reh. p. 19) Petitioner attached to his petition for rehearing as an Appendix the *voir dire* examination of twelve prospective jurors, eight of whom had been removed for cause in violation of *Witherspoon* standards. (Pet. Reh. App. 1a-7a)

Mr. Justice Walter V. Schaefer dissented on the grounds: (1) that the State had failed to prove the petitioner guilty beyond a reasonable doubt; (2) that a request is not an indispensable prerequisite to disclosure by the prosecution; that the duty of the prosecution to disclose exonerating evidence cannot be made contingent upon a request when the defense is ignorant of the existence of the suppressed information; that the suppressed exonerating evidence was not shown to be contained in the prosecutor's file; that non-disclosure denied petitioner fundamental fairness; that prejudice to the petitioner was identical whether the evidence was withheld by the prosecution or the police; (3) that the petitioner's right to cross examination had been restricted; (4) that a sixteen-gauge shotgun was improperly admitted in evidence since the prosecution had in its possession throughout the trial ballistic test results that showed that the deceased had been killed with a twelve-gauge shotgun and thus the sixteen-gauge shotgun was unsuitable for the commission of the homicide at bar.

SUMMARY OF ARGUMENT

I

FAILURE OF THE STATE TO DISCLOSE SIX ITEMS OF EXONERATING EVIDENCE TO PETITIONER AT TRIAL DENIED HIM A FAIR TRIAL AND DUE PROCESS OF LAW.

Petitioner was sentenced to death for murder. (A. 220) Six items of exonerating evidence were not disclosed to him at trial. (A. 58, 244-245, 251, 254-255, 260-261, 267, 271, 273, 275, 278, 283, 291, 293-296, 336-337, 340-341, 348, 351, 354, 357-358, 360)

The court below held that none of the items concealed were requested by petitioner during trial, and that:

> "The record discloses that the assistant State's Attorney at the trial showed his entire file to the defense attorney and no further request for disclosure was made." (App. 7a)

However, none of the exonerating items were contained in said prosecutor's file (A. 244-245, 254-255, 266-267, 283, 291, 293-296, 320-324, 346, 366) Trial defense counsel were ignorant of the existence of the suppressed information (A. 306-307, 310-311, 326-329), and could not reasonably be expected to make a request for evidence they did not know existed.

The decision is an open invitation to police and prosecutors to treat a murder case as a sporting event, to hide exonerating evidence from any accused secure in the knowledge that if the accused does not request suppressed information that he does not know exists there is no duty to disclose it.

II

WHERE THE DECEASED WAS KILLED WITH A TWELVE-GAUGE SHOTGUN, THE INTRODUCTION AND USE OF A SIXTEEN-GAUGE SHOTGUN TOTALLY UNCONNECTED WITH PETITIONER OR THE CRIME CHARGED, DENIED PETITIONER A FAIR TRIAL AND DUE PROCESS OF LAW.

The deceased was killed with a twelve-gauge shotgun. (A. 2, 139)

A sixteen-gauge shotgun, totally unconnected with petitioner (A. 58, 66-71), was admitted in evidence over his objection. (A. 81-94)

It is absolutely impossible to fire a twelve-gauge shell in a sixteen-gauge shotgun. "A twelve-gauge shotgun is larger than a sixteen-gauge." (Abst. 80)

The prosecutor used that irrelevant evidence with devastating effect against petitioner. He told the jury that the sixteen-gauge shotgun was not the weapon that killed the bartender. But, he argued that any man who was with another man who had such a weapon and shells for it, was the type of person that deserved the death penalty. (A. 199-201, 204-206)

Since the prosecutor admitted that the sixteen-gauge shotgun was *not* the weapon that killed the bartender (A. 137-138, 200, 202, 204-205), the only reason it was introduced and used against petitioner was to denounce him as a bad man, without regard to his guilt of the crime charged. (A. 199-201, 204-206)

III

THE DEATH SENTENCE IN THE CASE AT BAR CANNOT BE CONSTITUTIONALLY EXECUTED BECAUSE IT WAS IMPOSED BY A JURY FROM WHICH HAD BEEN REMOVED FOR CAUSE THOSE WHO, WITHOUT MORE, WERE OPPOSED TO CAPITAL PUNISHMENT OR HAD CONSCIENTIOUS SCRUPLES AGAINST IMPOSING THE DEATH PENALTY.

Relying heavily on its decision in *People v. Speck*, 41 Ill. 2d 177, the court below makes the gossamer distinction that wholesale removal of prospective jurors for cause proscribed by *Witherspoon* becomes constitutionally permissible if done on a retail basis. (App. 8a-11a) But, we say that the damage is precisely the same no matter how slowly or deliberately the *Witherspoon* doctrine is violated. *Speck v. Illinois*, _____ U.S. _____, June 28, 1971.

The court below also held that the State had sufficient peremptory challenges remaining to have eliminated those prospective jurors eligible to serve under *Witherspoon*. (App. 11a)

The record refutes that holding.

There were 8 veniremen removed for cause in violation of *Witherspoon* standards, and the State had only 4 peremptory challenges remaining, there were at least 4 prospective jurors that the State could not have removed peremptorily.

The holding of the court below is not only factually unsound but legally unsound. Error under *Witherspoon* is not excused simply because the prosecution has sufficient peremptory challenges to remove all such jurors. *In re Anderson*, 73 Cal. Rptr. 21, *Speck v. Illinois*, _____ U.S. _____, June 28, 1971.

ARGUMENT

In a trial for murder the State concealed six items of exonerating evidence and used a weapon that was not connected with the offense or the accused to denounce him as a bad man generally. A jury that had been selected in vio-

lation of *Witherspoon* standards found him guilty and fixed his punishment at death.

I

FAILURE OF THE STATE TO DISCLOSE SIX ITEMS OF EXONERATING EVIDENCE TO PETITIONER AT TRIAL DENIED HIM A FAIR TRIAL AND DUE PROCESS OF LAW.

Petitioner was sentenced to death for murder. (A. 220) Six items of exonerating evidence were not disclosed to him at trial. (A. 58, 244-245, 251, 254-255, 260-261, 267, 271, 273, 275, 278, 283, 291, 293-296, 336-337, 340-341, 348, 351, 354, 357-358, 360)

The court below affirmed petitioner's conviction and death sentence on the ground that none of the items concealed were requested by petitioner during trial, and that:

> "The record discloses that the assistant State's Attorney at the trial showed his entire file to the defense attorney and no further request for disclosure was made." (App. 7a)

However, none of the exonerating items were contained in said prosecutor's file. (A. 244-245, 254-255, 266-267, 283, 291, 293-296, 320-324, 346, 366) Trial defense counsel were ignorant of the existence of the suppressed information (A. 306-307, 310-311, 326-329), and could not reasonably be expected to make a request for evidence they did not know existed.

A. A Request Is Not An Indispensable Prerequisite To Disclosure Of Exonerating Evidence By The State.

Mr. Justice Walter V. Schaefer dissented in the case at bar. On this particular point, he stated:

> "... despite the language in *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194, I do not believe that the Supreme Court intended to establish a request as an indispensable prerequisite

to disclosure by the prosecution. Prior to *Brady* many courts had recognized the duty of the prosecution to disclose favorable, material evidence to the defense. And in many of those cases the defense did not know of the evidence and so had failed to request it. (*Money v. Holohan*, 294 U.S. 103, 79 L. Ed. 791, 55 S.Ct. 340; *Pyle v. Kansas*, 317 U.S. 213, 87 L. Ed. 214, 63 S.Ct. 177; *United States v. Dye*, (3d cir. 1955), 221 F.2d 763; *United States v. Baldi*, (3d cir. 1952), 195 F.2d (815)). In *Brady* the Supreme Court acknowledged the long-standing duty that rested upon the prosecution. In doing so, it used language appropriate to the decision of the case before it. Without an explicit holding to the contrary, I cannot believe that the Supreme Court intended to narrow the duty of the prosecution as it had existed prior to *Brady* by making that duty contingent upon a request when the defense is ignorant of the existence of the suppressed information. Essential fairness, rather than the ability of counsel to ferret out concealed information, underlies the duty to disclose. *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 215, 83 S.Ct. 1194; *Barbee v. Warden, Maryland Penitentiary* (4th cir. 1964), 331 F.2d 842; *United States v. Wilkins* (2d cir. 1964), 326 F.2d 135." (App. 17a-18a)

B. Material Evidence Favorable To An Accused Should Be Disclosed Without A Request Where Such Evidence Is Not Recorded.

Four of the six items of exonerating evidence were not even *recorded*. (A. 254-255, 346, 266, 294-295)

Certainly as regards 4 items of unrecorded exculpatory evidence, the defense could not reasonably have been expected to request them. "If the defense does not know of the existence of the evidence, it may not be able to request its production.". (*Giles v. Maryland*, 386 U.S. 66, at page 102, concurring opinion.)

Without exception, the federal courts of appeals that have interpreted *Brady* have held that the duty to disclose favor-

able evidence does not turn upon a request. It seems to us that the underlying policy consideration is the awesome disparity between the State's investigative machinery and that of an individual accused. Therefore, it seems to us that the majority opinion below is legally unsound.

C. Where A Prosecutor Shows His File To Defense Counsel, But None Of The Suppressed Information Is Contained In Said File, That Does Not Satisfy The State's Duty Of Disclosure.

Moreover, we submit that a defense counsel who looks at a prosecutor's file should be able to rely upon the inarticulated representation that everything material or relevant to the case is contained in that file. If exonerating information is not contained in the prosecutor's file, the defense is misled. (Cf. *Jackson v. Wainwright,* 390 F.2d 288, 298).

D. Only By Ignoring The Indisputable Facts Of Record At Bar Could The Majority Hold That There Was No Request.

Not only did Mr. Justice Schaefer dissent on the ground that nondisclosure denied this petitioner the fundamental fairness guaranteed by the constitution, citing *Brady v. Maryland,* 373 U.S. 83 and *United States v. Wilkins,* 326 F.2d 135, but he commented further:

> "The majority, however, disposes of this issue upon the ground that the defendant failed to request the evidence which was suppressed. This ground is neither factually nor legally sound. Prior to the trial the defendant had demanded copies of the grand jury minutes and of all statements made to the Lansing police. The motion was allowed only to the extent of providng the defendant with the statement of each witness who testified at the close of his direct examination. No statement of Virgle Sanders was supplied. Although, as the majority points out, the prosecuting attorney offered his file to the

defense at the trial, that attorney was unable to recall whether the items here involved were in that file. The defendant's attorney testified that none of these items was disclosed to him." (App. 17a)

On Monday, November 18, 1963, six months prior to the trial, the defense filed a formal written motion demanding a copy of the grand jury minutes and any and all written statements in the possession of the Lansing Police taken from complaining witnesses or any other witnesses subsequent to the offense set out in the indictment. (A. 5) What more could defense counsel request? Should he have asked for any and all information that the police and the prosecutors intended to suppress? Must any accused assume that the police and the prosecution will suppress anything not requested? Is the burden upon the accused to assume that the State will ignore Canon 5?

E. The Six Items Of Concealed Evidence Would Have Been Favorable And Material To The Defense.

Six items of exonerating evidence were concealed from the petitioner at the trial. They were brought to light at various times subsequent to the trial, and were formally established in the record at a post-convention hearing on January 11th and 12th, 1967.

Five of the items of exonerating evidence directly and indirectly concern the prosecution witness Virgle Sanders. Virgle Sanders testified at the trial that the petitioner Lyman Moore was the man that he knew only as "Slick"; that on April 27, 1962, at 2:30 P.M., he saw him in the Ponderosa Tap in Dolton (A. 41-42) at which time he said, "Hey Virgle, it's open season on bartenders. I shot one in Lansing Wednesday night". (A. 44, 47)

The five items are as follows:

(1) On April 30, 1962, at 8:50 P.M., Virgle Sanders gave a written statement to the Lansing Police in which he stated that he had first met "Slick" "about six months ago." (A. 351)

(The significance of that statement is that petitioner Lyman Moore was in federal prison at that time. The Lansing Police received an F.B.I. report in November, 1962 (A. 241), that showed Lyman Moore in a federal penitentiary from February 18, 1957, until March 4, 1962. (A. 354)

Petitioner's written pretrial demand for a copy of all statements made to the Lansing Police (A. 4-9) was denied on the representation of the prosecutor that all statements of prosecution witnesses would be supplied to the defense after the direct examination of each. (A. 7-9)

Copies of written statements to the Lansing Police of prosecution witnesses Hill and Powell were supplied to the defense at the close of their direct examinations. (A. 28, 33) But, Virgle Sander's written statement was *not* supplied to the defense for cross examination (A. 47-50, 326-327, App. 12), in spite of the *trial* prosecutor's representation that it would be supplied. (A. 7-9)

At the post-conviction hearing on January 11, 1967, Virgle Sanders testified definitely that he saw the man that he knew as "Slick" in Wanda and Del's tavern before Christmas of 1961. (A. 295) When confronted with the fact that the petitioner Lyman Moore had been incarcerated in a federal penitentiary until March 4, 1962, he admitted that it was *impossible* for Lyman Moore to be the man that he knew as "Slick" who two days after the murder had bragged that he had shot the bartender in Lansing. (A. 296; App. 15a))

(2) On April 30, 1962, shortly after Virgle Sanders had given his written statement to the Lansing Police, the Lansing Police raided Wanda and Del's tavern in Chicago, looking for "Slick". The owner-bartender, Delbert Jones, told them that he knew and could identify the man known as "Slick". (A. 254)

(Six months later, when the petitioner Lyman Moore was arrested (A. 78), the Lansing Police did

not contact Delbert Jones for the purpose of having him view the petitioner to identify him as the man known as "Slick". (A. 255, 336-337)

At the post-conviction hearing, Delbert Jones identified a photograph of James E. Watts (A. 274, 362) as the man known as "Slick" that used to come into his tavern in the autumn or fall of 1961. (A. 332, 334-335) He also testified that he was shown a photograph of Lyman Moore and said he was not "Slick". (A. 333) He saw Lyman Moore in person in the Cook County Jail on December 23, 1964, and said that he was not "Slick". (A. 337)

A prosectuion objection on the ground that defense counsel was not permitted to prove the petitioner innocent in a post-conviction hearing was sustained (A. 337), and Delbert Jones' testimony was stricken en toto. (A. 338))

(3) May 1, 1962, or shortly thereafter, the Lansing Police had an immediate suspect, James E. "Slick" Watts. They had a photograph of "Slick" Watts in their file on the Zitek murder case. (A. 275) Chief Braschler assigned Lt. Turbin to look for "Slick" Watts. (A. 346)

(The photograph was discovered after the post-conviction petition was filed. (A. 335) The fact that Chief Braschler considered James E. "Slick" Watts such a good suspect that he assigned Lt. Turbin to "look for" him was not brought to light until January 12, 1967, when Chief Braschler testified in the post-conviction hearing. (A. 346))

(4) On November 1 or 2, 1962, the Lansing Police took a photograph of the petitioner Lyman Moore to the home of William Leon Thompson. (A. 251, 272, 361) William Leon Thompson used to patronize Wanda and Del's tavern in the autumn of 1961. He knew Delbert Jones, the owner of Wanda and Del's, and he knew Virgle Sanders. He also knew and could identify the patron of Wanda and Del's who was known only by his nickname "Slick". He told Lt. Turbin and Sergeant Vandernoord of the Lansing Police that

Lyman Moore did not resemble "Slick". (A. 255, 267, 273, 278)

(This visit to Thompson's home and his statement that Lyman Moore did not resemble "Slick" was not disclosed to the defense at trial; it was not even recorded. (A. 266)

The Lansing Police had spoken to Thompson in the Ponderose tavern three days after the homicide, at which time he told them that he had heard about the bragging incident by "Slick" on the previous afternoon. (A. 265, 281-284) And the Lansing Police knew that Virgle Sanders, Delbert Jones, and William Leon Thompson all knew each other and that each knew "Slick". (A. 254, 283, 291, 293, 336)

Delbert Jones, the owner of Wanda and Del's tavern, was never brought in to view Lyman Moore by the Lansing Police, nor was he shown the photograph of him that was shown to Thompson. (A. 336-337, 348)

[Long after the trial, when Delbert Jones was shown the same photograph of Lyman Moore by defense counsel, and when he viewed Lyman Moore in person in the County Jail on December 23, 1964, he said that Lyman Moore was not "Slick". (A. 333, 337)]

Virgle Sanders was not permitted to look at Lyman Moore until May 13, 1964, over two years later, when he was brought to court to testify at the trial. (A. 294))

(5) On May 13, 1964, when Virgle Sanders was brought to court to testify at the trial, when he first saw Lyman Moore he said to Lt. Turbin and other Lansing police officers, in the presence of the prosecutors; "The guy that I knew as 'Slick' looked to be about 30 or 40 pounds heavier than this guy." (A. 294). The Lansing police officers said, "Well, you know how those jailhouse beans are." (A. 295)

(The fact of actively encouraging Virgle Sanders to falsely identify the petitioner as "Slick" was never recorded in any file. It was not revealed to

the defense at trial; it first came to light on June 12, 1965 (A. 291), and it was formally established in the record on January 11, 1967, at the post-conviction hearing. (A. 294-295))

The sixth item of exonerating evidence concerned the prosecution witness Henley Powell, who testified that he was playing pinochle with Donald O'Brien and two other men in Zitek's tavern at the time of the shooting; that he saw the shooting because he was seated facing the bartender with a view of the entrance. (A. 32, 34)

Donald O'Brien, a defense witness, testified that Henley Powell was seated with his back to the entrance, looking towards the other end of the tavern. (A. 120)

(6) The Lansing Police file contained a diagram, drawn by a Lansing police officer, which diagram contradicts the prosecution witness Henley Powell and corroborates the defense witness Donald O'Brien; it shows Henley Powell seated with his back to the entrance through which the assailant entered. (A. 244-245, 260-261, 340-341, 357-358, 360)

(At the post-conviction hearing the prosecutor did not recall ever having seen said diagram. (A. 327) Both defense counsel testified that said diagram was not supplied to them at the trial. (A. 307, 328)

The diagram first came to light some time subsequent to April 29, 1966 (A. 239) and was admitted in evidence at the post-conviction hearing on January 11, 1967. (A. 244-245) It shows that Henley Powell was seated with his back to the entrance through which the assailant entered. (A. 357-358, 360))

F. Nondisclosure Of Material Evidence Favorable To The Accused By The Prosecuting Police Department Is Imputable To The Prosecution.

The court below seemed to recognize that much of the exonerating evidence was concealed by the Lansing Police not only from the petitioner but also from the prosecutors:

> "... it does not appear that any error in the testimony was known to the prosecution." (App. 8a)

However, we submit that the correct view regarding the denial of this petitioner's federal constitutional rights is expressed by Mr. Justice Schaefer in his dissenting opinion:

> "... the prejudice to the defendant is identical whether the evidence is withheld by the prosecutor or by the police." (App. 18a, citing *Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842)

G. Where A State Knowingly Permits False Testimony To Remain Uncorrected, That Is A Denial Of Due Process Of Law Regardless Of Whether There Was Any Prior Request.

On appeal petitioner argued that the State had suffered false testimony to remain uncorrected. The court below recognized the fact that Powell was mistaken as to which direction he was facing at the time of the homicide but held, "Such contradictions in testimony go to the weight of the evidence and do not in any way indicate perjury." (App. 8a)

The fallacy to that kind of reasoning is that after twenty-five months Henley Powell might have honestly believed what he testified to, but the Lansing Police knew better because of the diagram in their file that showed he was mistaken or lying. And the jury had no opportunity to *weigh* the diagram that contradicted Powell and corroborated O'Brien. See, *Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842.

The court below missed the thrust of *Alcorta v. Texas*, 355 U.S. 28, *Napue v. Illinois*, 360 U.S. 264, and *Miller v. Pate*, 386 U.S. 1, when it held:

> "Sanders testified that the defendant was the man he knew as 'Slick'. Even though it appears that he said he had met Slick at a time that Moore was in fact in prison, and that other people did not know Moore as 'Slick', and the fact that Sanders had first stated that the man he knew as 'Slick' was about 30 or 40 pounds heavier than Moore does not indicate perjury, but mere testimonial inconsistency." (App. 8a)

The jury that sat in judgment of this petitioner was not permitted to hear one word of the "mere testimonial inconsistency" because the police *and* the prosecutors who had concealed it from the jury did *not* bring it to the attention of the jury.

The test to be applied in such cases is whether the testimony may have had an effect on the outcome of the trial. Even the dissenting opinion in *Giles v. Maryland*, 386 U.S. 66, at page 116, agrees that that is the standard:

> "The Court has held since *Mooney v. Holohan*, 294 U.S. 103, 79 L. ed. 791, 55 S. Ct. 340, 98 A.L.R. 406, that a State's knowing use of perjured testimony denies a fair trial to the accused. Mooney has been understood to include cases in which a State knowingly permits false testimony to remain uncorrected. *Alcorta v. Texas*, 355 U.S. 28, 2 L.ed. 2d 9, 78 S. Ct. 1173. The standard applied in such cases has been whether the testimony 'may have had an effect on the outcome of the trial.' *Napue v. Illinois*, supra, 360 U.S. at 272, 3 L.ed. 2d at 1223. These cases were very recently followed and applied in *Miller v. Pate*, 386 U.S. 1, 17 L.ed. 2d 690, 87 S.Ct. 785."

H. What Kind Of A Trial Would The Jury Have Heard If All Of The Undisclosed Evidence Had Been Presented?

Patricia Hill would have made her in-court identification of the defendant as the man who was ejected from Zitek's Tavern at 10:00 P.M. and who returned at 10:55 P.M. and shot Bernie Zitek in the heart with a shotgun. (A. 25-26)

Henley Powell would have made an in-court identification of the defendant as the assailant. (A. 32-33) But, evidence would have been introduced in the form of a diagram drawn by a Lansing police officer on the night of the homicide to show that he was sitting with his back to the entrance, indicating that he could not have seen the killing. (A. 260-261, 340-341)

Virgle Sanders would have testified as he did that he knew the defendant sitting in Court; that he knew him only by the nickname "Slick"; that he saw him in the Ponderosa Tap in Dolton on April 27, 1962, at 2:30 or 3:00 P.M. (A. 41-42); that the defendant said, "It's open season on bartenders. I shot a bartender in Lansing." (A. 47)

On cross examination it would have been shown that the first time that Sanders was asked to view the defendant was that day in court; that when he first saw him he said that the guy he knew as Slick looked to be about 30 or 40 pounds heavier than the defendant; that the Lansing police said, "Well, you know how those jailhouse beans are." (A. 295) It would have been established that Delbert Jones, the owner of Wanda and Del's tavern, knew Sanders and "Slick" and also William Leon Thompson. The witness would have been asked to verify the fact that he first met "Slick" in Wanda and Del's before Christmas of 1961. (A. 295) He would have been shown the F.B.I. report indicating that Lyman Moore was in federal prison in Leavenworth, until March 4, 1962, and he would have replied as he did in the post-conviction hearing, "If he's in jail, it would have been impossible to be the same man." (A. 296)

Chief Braschler would have been called to testify that the Lansing police had an immediate suspect by the name of Slick Watts, James E. "Slick" Watts; that he had assigned Lt. Turbin to "look for" Slick Watts. (A. 346)

Delbert Jones would have been called to testify that he knew a man called "Slick" that used to frequent his tavern Wanda and Del's; that the defendant in court was not the man called "Slick". (A. 337) He would have been shown a photograph of James E. Watts and would have testified that Watts was the man called "Slick". (A. 334)

William Leon Thompson would have been called to testify that he knew Virgle Sanders (A. 271), Delbert Jones, the owner of Wanda and Del's tavern, and a man called "Slick" that used to frequent that tavern. He would have been asked to look at the defendant in court, and he would have testified that the defendant was not the man that he knew as "Slick". (A. 273) He would have been shown a photograph of James E. Watts, and he would have testified that Watts was the man he knew as "Slick". (A. 274, 275, 276, 277)

Then, Donald O'Brien would have been called to testify as he did that he heard the shot but did not see the assailant; but that the defendant was definitely not the man that Bernie Zitek had ejected at 10:00 P.M. (A. 117)

In addition to all that of course there would be presented the testimony of two disinterested respectable alibi witnesses who would have testified as they did that the defendant was at work over fifty miles away at the time of the crime. (A. 96, 106) The alibi was corroborated by work records. (A. 99, 106, 109, 113)

Had the jury heard all the evidence, including the evidence that was not disclosed, it may have found the petitioner not guilty.

Mr. Justice Schaefer concluded from the trial record alone, even without the exculpatory evidence that was not disclosed, that the State had failed to prove the petitioner guilty beyond a reasonable doubt. (App. 13a-14a)

WHERE THE DECEASED WAS KILLED WITH A TWELVE-GAUGE SHOTGUN, THE INTRODUCTION AND USE OF A SIXTEEN-GAUGE SHOTGUN TOTALLY UNCONNECTED WITH PETITIONER OR THE CRIME CHARGED, DENIED PETITIONER A FAIR TRIAL AND DUE PROCESS OF LAW.

The deceased was killed with a twelve-gauge shotgun. (A. 2, 139)

A sixteen-gauge shotgun, totally unconnected with petitioner (A. 58, 66-71), was admitted in evidence over his objection. (A. 81-94)

The prosecutor used that irrelevant evidence with devastating effect against petitioner. He told the jury that the sixteen-gauge shotgun was not the weapon that killed the bartender. But, he argued that any man who was with another man who had such a weapon and shells for it, was the type of person that deserved the death penalty. (A. 199-201, 204-206)

The majority of the court below held:

> "There is no clear evidence of the weapon actually used in this homicide, although it is clear that it was a shotgun. We have consistently held that a weapon found upon a defendant suitable for the commission of a crime charged is proper evidence even though there is no showing that it was the actual weapon used. (Citing cases.)" (App. 4a)

Mr. Justice Schaefer dissented on the ground that in the cases cited by the majority no ballistic evidence was available, and therefore the suitability of the weapon could be established only by physical description, but that in the case at bar the prosecution had ballistic test results which showed that the bartender was shot with a twelve-gauge shotgun; that the sixteen-gauge shotgun was unsuitable for the commission of the murder. (App. 14a) And, of course, Mr. Justice Schaefer is right. One could not get a twelve-gauge shotgun shell into a sixteen-gauge shotgun with a hydraulic press! A twelve-gauge shotgun is larger than a sixteen gauge. (A. 80)

The dissenting opinion also pointed out that the sixteen-gauge shotgun was never in the possession or control of the petitioner. (App. 14a) The record verifies that observation. It did not belong to the petitioner and was not recovered from him. It was recovered from a 1957 Ford automobile (A. 58, 66-71) owned by a man named Barbee. (A. 68) The sawed-off barrel was recovered from Barbee's home. (A. 77)

Since the prosecutor admitted that the sixteen-gauge shotgun was *not* the weapon that killed the bartender (A. 137-138, 200, 202, 204-205), the only reason it was introduced and used against petitioner was to denounce him as a bad man, without regard to his guilt of the crime charged. (A. 199-201, 204-206)

This seems to be a case of first impression. We can find no case in which a weapon totally unconnected with the accused or the crime charged has been held admissible in evidence. The closest analogy that we can find is in cases involving prior convictions.

"While this Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decisions exercising supervisory power over criminal trial in federal courts, as well as decisions by courts of appeals and of state courts, suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause." (*Spencer v. Texas*, 385 U.S. 554, at 572-575, dissenting opinion, and cases cited therein.)

The case at bar presents an *a fortiori* situation. As the majority opinion in *Spencer v. Texas* points out, "under recidivist statutes, the jury learns of prior crimes committed by the defendant, but the conceded possibility of prejudice is believed to be outweighed by the validity of the State's purpose in permitting introduction of the evidence. The defendant's interests are protected by limiting instructions. . . ." (385 U.S. 554, at 561).

In the case at bar, there were no limiting instructions. Indeed, there could not have been any. Either the sixteen-gauge shotgun was relevant to the question of guilt or innocence of the crime charged, or it wasn't. The dissenting opinion holds, and the record shows, that it was not.

It is pure sophistry to hold that there is no clear evidence of *the weapon* actually used in this homicide (App. 4a) when the prosecutor admitted that the sixteen-gauge shotgun was *not* the weapon used to kill the deceased. (A. 137-138, 200, 202, 204-205)

It *was* used in an attempt to kill the petitioner.

Here are a few excerpts from the prosecutor's closing argument that demonstrate how he used the sixteen-gauge shotgun to obtain a death penalty verdict from the jury:

> Mr. Fleming: Now, he stated to you about the most important witness in this case is this shotgun. And he said this shotgun was found again in a car that was not owned by this defendant. But it was a car that this defendant—and again this man with the mustache were arrested getting in the automobile.
>
> They say this is a 16, which it is, it is a 16. And we stipulated that the pellets, if the expert would have testified that in his opinion they would have been from a twelve-gauge shotgun. He said because this is a 16 and because the pellets came from a twelve-gauge shotgun, really this is the most important thing in this case.
>
> We never contended and we don't now, and the evidence doesn't show it, that this is the shotgun that killed Bernard Zitek. He said, well, this is the thing and the reason why you should go back and find this man not guilty.
>
> Lyman Moore, I submit to you, is that type of defendant that knows when he shoots a bartender and kills that bartender, about the only way for him to get out of it is to toss the shotgun he shot the bartender with in a creek, bury it, burn it or something else, because he knows if he ever gets caught with that shotgun he is absolutely a goner.

This is not the shotgun that killed Bernard Zitek, there is no question about it. But one thing we know from this shotgun being in that car—let me have those pellets—that the man with the mustache again and Lyman Moore are those kind of people that use shotguns.

And take a look at those, folks, these are in evidence so you can look at them. You see this shell here, it has a ballbearing at the end of it. I wonder what they were going hunting for with this. Pheasants? You shoot deer with this in Wisconsin and Michigan. The other three are goose shot, number 4's. You shoot geese in Canada with that, you don't hunt pheasants in Illinois or target practice with these things, you kill things with this. There is a ballbearing at the end of this, and that is what was in this weapon when it was found in the car as Lyman Moore and this other man went to get into it. (A. 199-201)

* * * * *

Is it the type of case where the person has a fight, —and when I say a fight, he uses abusive language at a bartender and the bartender, because he uses this abusive language, tells him he is going to get kicked out, is it reason enough for a man to come back with that shotgun or one like it, it wasn't this one it was one like it, and kill that person?

Is it reason enough to come back an hour later with the shotgun, a loaded shotgun, and kill that person? These are the things you take into consideration.

The next thing you take into consideration is when Moore came back at 11:00 o'clock, walked into the bar with a shotgun, they said it was a single barrel shotgun, cold-bloodedly placed the shotgun on the bar, aimed it at the bartender, pulled the trigger and left. That is what he did.

Is this the type of case that deserves a recommendation of the death penalty? Take into consideration this, and this is in evidence. This is a shotgun, this

is a sixteen-gauge shotgun. A twelve-gauge shotgun killed Bernie Zitek. Is the shotgun the most humane type weapon that if someone were to kill another person or shoot them, is this the type of weapon that you would say well, he didn't have the right to kill him but at least it was a clean death.

You heard Doctor Wagner testify. He testified that this—when I say "this" I am not referring to this specifically but a shot gun shell entered his right chest and all the beebees went all over and his heart exploded and that's why he died. Is this the way people should die? Is this the kind of case that deserves the death penalty? (A. 204-205)

* * * * *

Is the death penalty the type of penalty that is appropriate for shotguns loaded with ballbearings? Is the death penalty appropriate in this type of case where a weapon such as this, not a pistol, not a revolver, an automatic or a rifle, not a club was used but a hard, cold shotgun that shoots a slug about the size of this. Is this the type of case?" (A. 206)

If one accepts the prosecutor's theory of guilt by association, the most that can be said for the sixteen-gauge shotgun is that it is evidence of general criminal disposition of someone else. Yet, it pervaded the entire trial from the opening statement (A. 16), during presentation of evidence (A. 57-59), and the major portion of the closing argument as we have shown. Since it was not connected with the offense or the accused, it cannot even qualify as propensity evidence. And the courts have consistently held that type of evidence inadmissible. (*Spencer v. Texas*, 385 U.S. 554, at 572-575, dissenting opinion, and cases cited therein.)

III

THE DEATH SENTENCE IN THE CASE AT BAR CANNOT BE CONSTITUTIONALLY EXECUTED BECAUSE IT WAS IMPOSED BY A JURY FROM WHICH HAD BEEN REMOVED FOR CAUSE THOSE WHO, WITHOUT MORE, WERE OPPOSED TO CAPITAL PUNISHMENT OR HAD CONSCIENTIOUS SCRUPLES AGAINST IMPOSING THE DEATH PENALTY.

The court below held:

> "On *voir dire* in this case each juror was asked in substance: Do you have any religious or conscientious scruples against the infliction of the death penalty in the proper case? Twelve jurors positively asserted that they had such scruples and were excused for cause without motion by the State or objection by the defendant.
>
> The tenor of the entire examination, however, was unlike *Witherspoon* where the trial court promptly removed all who expressed the slightest qualms about capital punishment." (App. 8a-9a)

Relying heavily on its decision in *People v. Speck*, 41 Ill. 2d 177, the court below makes the gossamer distinction that wholesale removal of prospective jurors for cause proscribed by *Witherspoon* becomes constitutionally permissible if done on a retail basis. (App. 8a-11a) But, we say that the damage is precisely the same no matter how slowly or deliberately the *Witherspoon* doctrine is violated. *Speck v. Illinois*, _____ U.S. _____, June 28, 1971.

Clearly, emphatically, and categorically, your Honors said in *Witherspoon*:

> "Specifically, we hold that a death sentence cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." (*Witherspoon v. Illinoi*, 391 U.S. 510, 522)

That language was plain enough for the California Supreme Court to hold that reversal of a death sentence is automatically required if a single venireman was improperly excused for cause on the basis of his opposition to the death penalty. *In re Anderson*, 73 Cal. Rptr. 21 (11-18-68).

On April 2, 1969, this Court made it crystal clear that it meant just what it said in the *Witherspoon* case. *Boulden v. Holman*, 394 U.S. 478. In a 7 to 1 decision, the case was remanded to the District Court for hearing, citing footnotes 9 and 21 of *Witherspoon*.

And on June 28, 1971, this Court held in *Speck v. Illinois*, ____ U.S. ____, that the death penalty had to be set aside under *Witherspoon*.

The court below also held that the State had sufficient peremptory challenges remaining to have eliminated those prospective jurors eligible to serve under *Witherspoon*. (App. 11a)

The record refutes that holding.

Each side had 20 peremptory challenges under the statute. (Ill. Rev. Stat. 1963, chap. 38, par. 115-4(e)) The prosecution had exercised 16 peremptory challenges. (Trial Record, pp. 146, 162, 242, 242, 242, 269, 277, 281, 303, 322, 322, 329, 329, 342, 346, 350). There were 8 prospective jurors removed for cause clearly in violation of *Witherspoon* standards:

Excerpts From The Record
On
Voir Dire Examination

Page of Record

118 ESTHER BYRNE, prospective juror:

122 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. Well, ordinarily enough, I take the same stand as Mr. Bryne. I don't believe in capital punishment.

Q. In other words, even if we have a law in this State to that effect, you wouldn't believe in it, anyway?

A. No, I don't, definitely not.

The Court: Very well. That's your prerogative. You're excused for cause.

LOUIS LORENS, prospective juror:

151 Q. Do you know of any reason why you cannot
152 be a fair and impartial juror in this case?

A. I do not believe in capital punishment.

The Court: Well, step down.

(Prospective juror excused.)

210 KATHERINE KRISTOCK, prospective juror:

212 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. I'm afraid I do. I don't believe in capital punishment.

The Court: Step down, please.

(Prospective juror excused.)

248 MARIAN PETERSON, prospective juror:

250 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I have very strong convictions against capital punishment.

The Court: Step down, please.

(Prospective juror excused.)

NEBRASKA PETTY, prospective juror:

252 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No, sir.

Q. Do you have any religious or conscientious scruples against the infliction of a death penalty in a proper case?

A. I do.

The Court: Step down.

(Prospective juror excused.)

308 JACQUELINE B. THREATT, prospective juror:

309 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I do.

Q. You do? What do you mean?

A. I don't believe in capital punishment.

Q. Say that again.

A. I feel very strongly against capital punishment.

The Court: Step down, please. Call another juror.

350 MARY GORSKI, prospective juror:

352 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No, sir.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I do, your Honor.

The Court: All right, step down.

365 ANNA L. HOHNWALD, prospective juror:

366 Q. Do you know of any reason why you cannot be a fair and impartial juror in this case?

A. No, sir.

Q. Do you have any religious or conscientious scruples against the infliction of the death penalty in a proper case?

A. Yes, I do.

Q. Step down, please.

Since there were 8 veniremen removed for cause in violation of *Witherspoon* standards, and the State had only 4 peremptory challenges remaining, there were at least 4 prospective jurors that the State could not have removed peremptorily.

The holding of the court below is not only factually unsound but legally unsound. Error under *Witherspoon* is not excused simply because the prosectuion has sufficient peremptory challenges to remove all such jurors. *In re Anderson*, 73 Cal. Rptr. 21; *Speck v. Illinois*, _____ U.S. _____, June 28, 1971.

The death penalty should be vacated.

CONCLUSION

Petitioner prays that the judgment of the court below be reversed.

Respectfully submitted,

Gerald W. Getty,
Public Defender of Cook County, Illinois
Richard J. Horka and
William H. Hall, and
James J. Doherty,
Assistant Public Defender

By: James J. Doherty
Counsel for Petitioner

August 11, 1971

ORIGINAL

SEP 4 1971

OCT 12 1971

RECEIVED

SEP 4 1971

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1971
No. 69-5001

LYMAN A. MOORE,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Motion for Leave to File Brief Amici Curiae and Statement of Interest of the Amici.

and

Brief of N.A.A.C.P. Legal Defense and Educational Fund, Inc., and National Office for the Rights of the Indigent.

JACK GREENBERG,
JAMES M. NABRIT, III,
JACK HIMMELSTEIN,
ELAINE R. JONES,
MARY LYNN WALKER,
10 Columbus Circle,
Suite 2030,
New York, New York 10019,

ANTHONY G. AMSTERDAM,
School of Law,
Stanford University,
Stanford, California,

Attorneys for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and National Office for the Rights of the Indigent.

Of Counsel:
RICHARD J. STONE,
STUART P. TOBISMAN.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

	Page
Motion for Leave to File Brief Amici Curiae and Statement of Interest of the Amici	1
Statement of Facts	7
Summary of Argument	8
Argument	9
I. The Death Penalty Cannot Be Carried Out in This Case Because Veniremen Who Voiced Mere General Objections to the Death Penalty Were Removed From the Jury Which Imposed the Sentence	9
II. The Question of Whether the Tenor of the Voir Dire in This Case Differed From That in Witherspoon Is Irrelevant to the Issue of Whether Veniremen Were Improperly Excluded	16
III. The Availability of Peremptory Challenges to the State Does Not Render Harmless the Improper Exclusion of Veniremen Under Witherspoon	18
Conclusion	21
Appendix. Excerpts From the Record on Voir Dire Examination	App. p. 1